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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 26 1995

In re Application of)
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COMMUNITY EDUCATIONAL ASSOCIATION)
Holly Hill, Florida)
)
For a Construction Permit for a)
New Noncommercial Educational FM)
Station on Channel 212A at)
Holly Hill, Florida)

MM Docket# 88-)
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
File No. BPED-930316MF

DOCKET FILE COPY ORIGINAL

To: Honorable Joseph Chachkin
Administrative Law Judge

PROPOSED FINDINGS OF FACT

AND CONCLUSIONS OF LAW OF

COMMUNITY EDUCATIONAL ASSOCIATION

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January 26, 1995

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**PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Community Educational Association ("CEA"), by its counsel and pursuant to Section 1.263 of the Commission's Rules, hereby submits its Proposed Findings of Facts and Conclusions of Law in the above-captioned proceeding.

I. Preliminary Statement

1. By Hearing Designation Order, DA 94-789, released August 2, 1994 (the "HDO"), the Chief, Audio Services Division set this proceeding for hearing. At the time, CEA's application was mutually exclusive with the application of Cornerstone Community Radio, Inc. ("CCR"). In addition to the standard non-commercial comparative issues, the HDO specified the following two issues against CEA:

To determine whether CEA is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503(a) of the Commission's Rules.

To determine whether there is a reasonable possibility that the tower height and location proposed by CEA in this proceeding would constitute a hazard to air navigation.

2. On August 30, 1994, before expiration of the thirty day period for filing amendments as of right in response to issues first raised in a hearing designation order ¹, CEA filed an engineering amendment which purported to resolve the mutual exclusivity between its application and the application of CCR. By Memorandum Opinion and Order, FCC 94M-521, released September 13, 1994 ("MO&O"), the Presiding judge accepted CEA's amendment, and granted CCR's application. The MO&O left CEA in the docketed proceeding as a "singleton" applicant pending resolution of the two issues specified against it.

3. Written Direct Case Exhibits were filed by CEA on December 7, 1994. A single hearing session was held on December 15, 1994. The Presiding Judge closed the hearing record at the end of the December 15, 1994 hearing session. The Presiding Judge established January 26, 1995 as the deadline for filing Proposed Findings of Fact and Conclusions of Law and February 2, 1995 as the deadline for filing replies thereto. (TR 76)

4. CEA filed a Petition to Reopen the Record and for Leave to Amend on January 18, 1995 (the "Petition to Reopen"). CEA proffered an amendment consisting of an FAA determination of no hazard for a maximum tower height of 114 feet above ground level and an engineering amendment to conform the technical exhibit in its application to the FAA approved height. ²

¹ 47 C.F.R. § 73.3522(b)(2).

² The Petition is still pending before the Presiding Judge.

II. Proposed Findings of Fact

A. The Section 73.503(a) Issue

5. CEA is an educational organization created for the purpose of establishing a non-commercial educational FM broadcast service to the Holly Hill, Florida community and

"propagating high quality educational programs (broadcast and otherwise) by all available means and in pursuance of said purposes to engage in whatever form of educational activity that may be necessary to promote such purposes."

CEA Ex. 1, p. 1. The officers of CEA are Jose Mercado, President; Orlando Mercado, Vice President; and Clara del Toro, Secretary Treasurer. CEA Ex. 1, p. 6. CEA's goal is to "increase political and social awareness, improve relationships and provide better understanding between different cultural/ethnic groups, with a special emphasis on Hispanic/Anglo relations." CEA Ex. 2, p. 1. CEA also plans to "keep its community educated and informed [about] issues of local concern." Id. CEA will conduct informal ascertainties of local business, religious and political leaders, and assess letters and phone calls from listeners to keep aware of important community issues. Id.

6. To advance its educational program, CEA has proposed a schedule of predominantly locally produced programs addressing issues CEA believes are of concern to their listening audience. CEA Ex. 6. Three of the important issues CEA's programming will address are health care, education and family life. CEA Ex. 2, p. 1-2. In addition to programs acquired from outside sources, CEA plans to address health care issues with "The Health Hour," a locally produced program in a call-in or interview format which

will feature health professionals addressing topics such as drug abuse prevention, Alzheimer's Disease, AIDS and health insurance. CEA Ex. 6, p. 4. CEA also plans to locally produce a program dealing with conservation and pollution control called "Planet Consciousness." CEA Ex. 5, p. 5.

7. CEA plans to offer a variety of locally produced educational programming. CEA plans to coordinate with Mainland High School, Daytona Beach Community College and the University of Central Florida to offer "The Radio School." CEA Ex. 6, p. 1. The courses will be of general interest and, if details concerning curriculum can be worked out, some of the instructional programs will be offered for credit towards either a GED or college diploma at local educational institutions. Id. The courses will be in basic skills such as math, reading, and health and hygiene. Id. To better serve the community, CEA plans to make certain classes offered on "The Radio School" available in Spanish. Id. CEA will also produce "The Church Hour" which will feature multi-denominational religious education. CEA Ex. 6, p. 3. A locally produced program called "Learning New Skills" will offer listeners help in learning and developing techniques to help them in their businesses or vocations. CEA Ex. 6, p. 4. In cooperation with the local public library systems, CEA plans to produce "The Library Show" which will focus on literature and the availability and use of library research tools.

8. To address family life, CEA plans to broadcast "Focus on the Family" which is produced by the Family Ministries. CEA Ex. 6,

p. 2. CEA will work with local children to produce "The Student Hour" which will allow students to produce and direct radio programs responsive to the particular concerns of today's young people. Id. CEA envisions programs concerning relationships with parents, increasing violence in the community and drug abuse. Id.

9. CEA also plans to offer news and general public affairs programming from outside sources and plans to locally produce the following programs: "Learning About The Law" where practitioners will educate and answer questions of the listening audience on topics of general law, CEA Ex. 6, p. 3; "The News Hour" offering international and national news, with a special focus on local news and newsmakers, CEA Ex. 6, p. 4; "This Day", an hour-long analysis of local, national and international current events, with interviews and opportunities for listeners to call-in and speak with local leaders and newsmakers; "Community Hotline" focusing on consumer education and resolving consumer problems, CEA Ex. 6, p. 5; "Community Voice" featuring interviews and panel discussions with local community leaders and politicians to address issues of local concern, including an exploration of community resources available to area residents. Id.

10. CEA has categorized its programming as follows:

The Radio School - Instructional/General Ed.	8 hrs/wk ³
Focus on the Family - General Ed.	7 hrs/wk
The Student Hour - General Ed./Public Affairs	6 hrs/wk
Learning About the Law - General Ed./Public Affairs	4 hrs/wk
The Church Hour - General Ed.	7 hrs/wk
The Health Hour - General Ed.	7 hrs/wk
Learning New Skills - General Ed.	3 hrs/wk
The News Hour - News/Public Affairs	5 hrs/wk
Community Hotline - Public Affairs	3 hrs/wk
Planet Consciousness - Public Affairs	4 hrs/wk
Community Voice - Public Affairs	3 hrs/wk
This Day - General Ed./Public Affairs	7 hrs/wk
The Library Show - General Ed./Public Affairs	3 hrs/wk
Religious Music - Light ent./Perf. Arts	10 hrs/wk
Pre-recorded Public Affairs block - Public Affairs	7 hrs/wk

CEA Ex. 6 pp. 1-6. CEA plans to initially broadcast 12 hours per day, seven days a week for a total of 84 hours per week. Assuming a one-hour program categorized as "general education and public affairs" is credited as 30 minutes of general education and 30 minutes of public affairs, then each week, CEA will offer 4 hours of instructional programming, 38 hours of general educational programming, 29.5 hours of public affairs programming, 2.5 hours of news programming and 5 hours of performing arts programming and 5 hours of light entertainment programming. CEA Ex. 6.

B. The Air Hazard Issue

11. To resolve the mutual exclusivity between its application and the CCR application, CEA filed an engineering amendment proposing a new site. CEA simultaneously notified the FAA of its proposal. See Technical Statement to August 30, 1994 Amendment, p.

³ Even though agreements with the various educational institutions contacted by CEA are not in place, CEA is entitled to credit for its instructional programming proposal. See Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2579 (Rev. Bd. 1991).

2 (Official Notice requested). On October 24, 1994, the FAA determined that further study of CEA's proposal would be necessary and CEA so advised the Commission on October 27, 1994. See October 27, 1994 Amendment filed by CEA (Official Notice requested). The FAA advised CEA that its proposal would be subject to a public comment period. CEA amended its application to reflect that fact on November 17, 1994. See November 17, 1994 Amendment filed by CEA (Official Notice requested).

12. Following receipt and analysis of the comments filed, the FAA issued a determination of no hazard for CEA provided the height of its proposed tower did not exceed 114 feet. CEA commissioned the preparation of an engineering exhibit to reflect the new tower height and petitioned the Presiding Judge to reopen the record to allow receipt of the FAA determination of no hazard and its engineering amendment. See Petition to Reopen.

III. Conclusions of Law

A. Section 73.503(a) Issue

13. Section 73.503(a) of the Rules provides that

a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.

47 C.F.R. § 73.503(a). The Commission's noncommercial educational FM application processing guidelines state that an applicant may qualify for an authorization in the reserved band as either an educational institution or an educational organization. See Appendix A to Notice of Inquiry, Docket 78-164, 53 FR 30842 (1989). See also Palm Bay Public Radio, Inc., 68 RR2d 1566, 1569 (1991).

Since CEA is not owned or controlled by an educational institution, it can only qualify for a reserved band license as an educational organization.

14. To qualify as educational organizations, applicants must demonstrate that they "have an educational goal and are committed to the advancement of an educational program." Palm Bay at 1569. An organization's "goal" or "purpose" can be as simple as a commitment "to develop educational programming for their community of license." Palm Bay at 1569. CEA's pledge to produce and provide programming which addresses local issues and to conduct informal local ascertainment to maintain an awareness of the community's changing needs and problems compares favorably with the educational goal approved by the Commission in Palm Bay. Palm Bay, supra, 68 RR2d 1569 (applicant's statement that it will ascertain and develop local programming for its community of license held to be "an acceptable and consistent manifestation of its educational goal.") See also Christian Family Cinema, Inc., 7 FCC Rcd 3304 (Admin L Judge 1992) (applicant's representation that it would provide educational programming to community of license by working closely with leaders of the community in the area of religion, civics and education found sufficient for summary decision on Section 73.503(a) issue.) Demonstrating how an applicant will advance its educational program requires an analysis of the applicant's proposed programming.

15. A noncommercial educational applicant/licensee is given broad discretion, free of government oversight, over the selection

of programming it broadcasts. According to the Supreme Court, Section 326 of Communications Act of 1934 was enacted to "explicitly prohibit the Commission from interfering with free speech over the broadcast frequencies." ⁴ Licensee are, the Court continued, "'public trustees' charged with the duty of fairly and impartially informing the listening and viewing public." CBS v. Democratic National Committee, 412 US 94 (1973). See also Public Radio and TV Programming (NPRM), 87 FCC2d 716, 731-32 (1981) ("The Commission's role in the programming decisions of all broadcasters has always been profoundly affected by its sensitivity to the First Amendment rights of the public and of broadcasters and the specific non-censorship provision of Section 326 of the Act.")

16. Though emphasis is given to programs that are instructional (for credit) and general education (no formal credit) ⁵, not all program offerings must be instructional or educational. ⁶ See Seattle Public Schools, 65 RR2d 1621, 1643 (Rev. Bd. 1989) (In order to qualify as an educational

⁴ Section 326 of the Communications Act of 1934, as amended, states:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. 47 U.S.C. § 326.

⁵ Palm Bay, supra, 68 RR2d 1569.

⁶ In fact, noncommercial licensees that utilize their stations primarily for in-school instructional programming were reminded that broadcast of exclusively instructional programming might not constitute service to the public. Seattle Public Schools, 65 RR 2d, 1633, n. 30.

organization, it is not necessary that the proposed programming be exclusively educational.) See also S. Nisenbaum, 19 RR 1175 (1960) (Commission rejects proposal to restrict noncommercial licensees to accredited educational organizations offering instructional programming.) In fact, the Commission recognized long ago that while many noncommercial educational stations still devote a portion of their broadcast day to instructional/educational programming, a major portion of the day, particularly evening hours and weekends, are devoted to programs aimed at community problems, needs and interests. Educational Broadcast and Renewal Applications, 42 FCC 2d 690, 694 (1973). Most recently, the Commission summed up the programming obligation of noncommercial licensees by concluding they are required to broadcast issue oriented programming, documenting compliance with quarterly issues/program lists. Public Broadcast Stations (Programming and Reporting Requirements), 56 RR2d 1157, 1162, 1164 (1984).⁷ From the Commission's perspective, the primary difference between commercial and noncommercial operations

public broadcasting is characterized largely by a negative distinction, i.e., public stations are not operated by profit seeking organizations nor supported by on-the-air advertising.

Public Radio and TV Programming, supra, 87 FCC 2d at 732. Against this backdrop, the evidence put forth by CEA demonstrates sufficiently its intent to advance an educational program.

⁷ This same Report and Order eliminated formal ascertainment requirements for noncommercial applicants and licensees. Public Broadcast Stations, supra, 56 RR2d 1162.

17. CEA's proposed initial 84 hour per week broadcast schedule is in excess of the minimum number of hours of operation required by Section 73.561(a) of the Commissions Rules. 47 C.F.R. § 73.561(a). Of those 84 hours, CEA plans to offer 4 hours of instructional (for credit) programming, 38 hours of general educational (more general interest and not for academic credit) programming, 29.5 hours of public affairs programming, 2.5 hours of news programming, 5 hours of performing arts programming and 5 hours of light entertainment programming.⁸

18. In Moody Bible Institute, 40 RR2d 1264 (1977) the Commission granted an application which proposed a schedule of 25.7% instructional/educational programming, 8.5% public affairs programming, 20% light entertainment programming and 26% performing arts programming. CEA proposes 50% instructional/educational programming, 35% public affairs programming and 12% performing arts/light entertainment. If, indeed, special emphasis is given to instructional/general educational programming, Palm Bay, supra, then CEA's proposal is quantitatively superior to the proposal approved in Moody Bible. However, quantitative analysis is not the most important factor in an assessing the merits of a noncommercial applicant's proposal. The true test is whether the proposed programming is responsive to the perceived needs and problems of

⁸ Though the Commission no longer requires applicants to submit weekly program schedules (Palm Bay, supra, 68 RR2d 1570), CEA provided one as part of its written direct case in light of the Presiding Judge's Memorandum Opinion and Order, FCC 94M-638, released December 5, 1994, denying CEA's motion for summary decision on the Section 73.503(a) issue.

the community. Public Broadcast Stations, supra, 57 RR2d 1160, 1162. Since formal ascertainment requirements were eliminated, methodology in creating an issues/program list is not at issue. Public Broadcast Stations, supra, 57 RR2d 1662 (instead of focusing on time-consuming, burdensome and formalistic ascertainment requirements, the Commission concluded that "licensees should be afforded wide discretion to determine how community needs should be ascertained and met.") Given that wide latitude, CEA's initial decision to address health care, education and family life issues is reasonable.

19. As discussed in the proposed findings (§§ 6-9, infra), CEA offers a sufficient amount of programming, of sufficient quality to advance its educational program. CEA will conduct informal ascertainments to keep its issues/program lists fluid, as the needs and concerns of its listening community changes.

B. Air Hazard Issue

20. CEA has pending before the Presiding Judge a Petition to Reopen which proffers an FAA determination of no hazard at the site CEA proposed and an engineering amendment at the height approved by the FAA. The Mass Media Bureau ("MMB") has not commented on CEA's Petition to Reopen, however, assuming they offer supportive comments, the petition should be granted, and CEA's amendment accepted. In the event the amendment is accepted, the pending air hazard issue should be resolved in CEA's favor. Since filing the amendment to remove the conflict between its application and the mutually exclusive application of CCR, CEA has diligently pursued

issuance of a determination of no hazard at its amended site. Through amendments, CEA has kept the Commission apprised of the status of its proposal at the FAA. The FAA "circularized" CEA's proposal and did not complete its review of the comments thereon and reach a determination until January 12, 1995. Six days later, CEA filed a complete engineering amendment at its amended site, specified the height approved by the FAA. Contingent on comments from the MMB affirming that CEA's amendment complies with the Commission's technical rules, CEA's diligence should be rewarded with acceptance of the proffered amendment and resolution of the air hazard issue in its favor. See Kevin Potter. 70 RR2d 196, 198-99 (Rev. Bd. 1991) (pending running of full "circularization" of proposal before the FAA, there is at least a "reasonable possibility" that proposal could be accepted.) See also Women's Broadcasting Coalition, Inc., 59 RR2d 730, 731 (1986)

IV. Conclusion

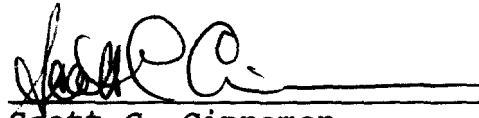
21. CEA's has met its burden of proof on both outstanding issues. It has demonstrated that it qualifies as an educational organization for purposes of becoming a reserved band FM licensee. It has set forth an acceptable educational goal, and a sufficient plan to advance its educational program. Commission policy and precedent support resolution of the Section 73.503(a) issue in favor of CEA.

22. CEA has diligently pursued a determination of no hazard from the FAA with respect to its amended site. Having obtained such a determination, and having offered an amendment to conform

its engineering proposal to the FAA-approved height, CEA is entitled to, contingent upon MMB's concurrence, resolution of the air hazard issue in its favor.

WHEREFORE, based on the record evidence in this proceeding, it is respectfully requested that the Presiding Judge resolve the Section 73.503(a) issue and the air hazard issue in favor of CEA and grants its application for a new noncommercial educational FM Station to serve Holly Hill, Florida.

Respectfully submitted,
COMMUNITY EDUCATIONAL ASSOCIATION

A handwritten signature in dark ink, appearing to read "Scott C. Cinnamon", is written over a horizontal line.

Scott C. Cinnamon
Its Counsel

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January 26, 1995

CERTIFICATE OF SERVICE

I, Scott C. Cinnamon, do certify that on this 26th day of January 1995, a copy of the foregoing **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was sent via first class mail, postage pre-paid or delivered, as indicated, to the parties set forth below:

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